No. 89-719

In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STATES OF AMERICA, PETITIONER

v.

FRANKLYN C. NOFZIGER, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in a prosecution under 18 U.S.C. § 207(c), the government must allege and prove that the defendant had knowledge of the facts that would bring his lobbying activity within the statutory prohibition.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 878 F.2d 442. The memorandum opinion and order of the district court denying respondent's motion to dismiss the indictment (Pet. App. 41a-79a) and the memorandum opinion of the district court denying respondent's post-trial motions (Pet. App. 80a-105a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1989. A petition for rehearing was denied on September 5, 1989 (Pet. App. 106a-109a).

The petition for a writ of certiorari was filed on November 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Section 207(c) of the Ethics in Government Act prohibits certain former government employees, within one year after leaving office, from appearing before or communicating with intent to influence their former agency on any matter that is of "direct and substantial interest" to that agency. Such activities are not prohibited, therefore, if they relate to matters that are not of direct and substantial interest to the agency at the time of the contact.

1. In the instant case, respondent was convicted on three counts of communicating with his former agency, the Executive Office of the President (the "White House"). The indictment did not allege that respondent was aware of the existence of any direct and substantial White House interest in the matters that were the subject of his communications, and no proof demonstrating the presence of such knowledge was presented at trial. In so far as the evidence addressed this point at all, it showed that respondent's purpose was to create a White House interest where it was believed none existed. See Pet. App. 86a, 94a.

a. The first count on which respondent was convicted was based on a written memorandum from respondent to Edwin Meese, III, then Counselor to the President, in which respondent urged White House support for the efforts of the Welbilt Electronic Dye Corporation ("Welbilt") to obtain a contract from the Department of the Army for the manufacture of certain small engines. Pet. App. 5a-6a, 81a. The de-

cision whether to award the contract was then pending before the Army and was also of interest to the Small Business Administration, which had approved Welbilt for a noncompetitive contract award under a minority set-aside program. *Ibid.*

The evidence relied upon to show a "direct and substantial" White House interest in the contract consisted only of the unsupervised sporadic activities of a part-time White House volunteer, a few public inquiries, and general interest in the economic development of the South Bronx, where Welbilt was located. Pet App. 83a-85a. There was no evidence of any active White House interest in the matter at the time of respondent's memo and no evidence that respondent was aware of the inquiries or of the activities of the White House volunteer.

b. The second count on which respondent was convicted involved a written communication from respondent to James E. Jenkins, then Deputy Counselor to the President. *Id.* at 6a, 88a. This communication consisted in its entirety of a three-sentence postscript to a copy of a note respondent earlier had sent to a client, the Marine Engineers Beneficial Association (MEBA). The postscript related to an aspect of a maritime concept supported by MEBA known as "civilian manning," which refers to the use of civilian crews on noncombat navy vessels. The implementation of civilian manning was a matter under the responsibility of the Department of the Navy. *Id.* at 88a.

The evidence with respect to civilian manning showed that it was a maritime policy supported by the White House. It had been the subject of one brief exchange at a Cabinet Council meeting, had been mentioned in one document about maritime

policies, and was the subject of one meeting chaired by a White House staff member and a representative of MEBA. *Id.* at 89a-92a. Again, there was no evidence that respondent knew anything about these meetings or the maritime document.

c. The final count on which respondent was convicted involved a communication to staff members of the National Security Council (NSC) seeking support for continued funding for the Fairchild Republic Corporation's A-10 aircraft. *Id.* at 6a, 92a-94a. The evidence concerning funding of the A-10 showed that that decision was a part of the Defense Department budgeting process. The White House supported funding for continued production of the A-10, support that was manifested by a letter to the Defense Department expressing the President's position. *Id.* at 92a-94a.

There was no dispute that these charged communications occurred, or that respondent made them with the requisite "intent to influence." What was in dispute was (1) whether the White House in fact had a "direct and substantial" interest in the matters that were the subject of his communications and (2) whether respondent knew of any reason why he would be barred from making the communications in question. The latter issue, however, was removed entirely from the trial as a result of the district court's ruling that knowledge need not be proved. *Id.* at 55a-61a. Indeed, respondent's proffer of testimony regarding certain advice he received from his lawyer, who was present when one of the communications was made, was excluded as immaterial. See 2/5/88 Tr. 3549-50, 3578-79.

2. Respondent appealed his convictions contending, *inter alia*, that the Independent Counsel (IC), the

petitioner here, had failed to allege in the indictment or prove at trial that respondent had the requisite *mens rea* for conviction under the statute.[1] The court of appeals reversed the convictions. A majority of the court agreed that the indictment was invalid because it did not require the prosecution to prove that respondent had knowledge of the facts that made his conduct unlawful. The court noted (Pet. App. 8a) that the statute did not prohibit lobbying for the purpose of stimulating an interest where no substantial interest existed. It then posed the question presented regarding the reach of the knowledge requirement as follows (*id.* at 4a; emphasis in original):

> If Nofziger's interpretation is correct, no one may be convicted under subsection 207(c) unless it is proven that he had knowledge of each of the facts constituting the offense. On the other hand, under the government's interpretation, if an ex-official tries to interest his former agency in a particular project in the *mistaken* belief that it had no "direct and substantial interest" in it, he will have committed a felony punishable by up to two years in jail.

In the court's view, the IC's interpretation of Section 207(c) "would impose strict criminal liability

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[1] Respondent also contended (1) that the meager evidence of White House interest in the Army engine contract and civilian manning was insufficient to show the existence of a "substantial" agency interest, (2) that none of the matters were ones in which there was a "direct" agency interest, because none were within the official responsibilities assigned by Constitution, statute, or regulation to the Executive Office of the President, and (3) that the interpretation given Section 207(c) by the district court rendered that provision unconstitutionally vague as applied to respondent. Because of the court of appeals' disposition of the case, it had no occasion to reach these issues.

on a lobbyist (by definition, one who communicates with the intent to influence) who is misinformed as to what matters are of current interest to his former employer." Pet. App. 8a-9a. After considering the language, legislative history, and official interpretations of the statute, the court found no support for the IC's contention that Section 207(c) "unambiguously limits the reach of 'knowingly' to the appearance clause." *Id.* at 21a. The court ruled that the statute was ambiguous, and it resolved the ambiguity by applying basic canons of statutory construction—the rule of lenity and the presumption in favor of *mens rea*. The court held that those "time-honored" rules "dictate" that the court interpret the statute "as requiring the government to demonstrate that Nofziger had knowledge of the facts that made his conduct criminal." *Id* at 27a. In so holding, the court rejected the IC's argument that Section 207(c) is a "public welfare" offense requiring no *mens rea* because, in part, of the potential for chilling First Amendment activity if strict liability were imposed.

Judge Edwards dissented. Based on his analysis of the placement of commas and the absence of additional clarifying punctuation, Judge Edwards concluded that the IC's interpretation was compelled by the statutory language. Pet. App. 36a. He also believed that certain passages in the Conference Committee Report "plain[ly] indicat[ed] * * * congressional intent" to dispense with any knowledge requirement in the case of communications by an employee with his former agency. *Id.* at 29a. Finding " 'no ambiguity to resolve' " (*id.* at 28a), Judge Edwards was of the view that application of the rule of lenity or the presumption of *mens rea* was unwarranted in this case.

ARGUMENT

I. THIS CASE INVOLVES NO ISSUE OF PRACTICAL OR LEGAL IMPORTANCE

Rarely has a certiorari petition filed in the name of the United States sought review of an issue so lacking in legal or practical importance as the issue of statutory interpretation proffered by the Independent Counsel in this case.[2] And rarely has such candor been displayed as in the IC's concession (Pet. 7) that "there is no conflict in the circuits on the meaning of [Section 207(c)], no other court has addressed the issue, and no conflict is likely to arise if the decision below goes unreviewed." Moreover, the holding of the court of appeals that the prosecution must establish the defendant's knowledge of facts underlying an essential element of the Section 207(c) offense is in the mainstream of traditional criminal law principles. The reasons given by the IC why this Court should nevertheless grant the petition are wholly unpersuasive.

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[2] From its inception, the investigation and prosecution of respondent has been conducted by an Independent Counsel. While the IC clearly is vested by law with the powers of the Department of Justice in this matter, the institutional differences between the Department of Justice and an Independent Counsel have had profound consequences for respondent. The most obvious and important one concerns the exercise of prosecutorial discretion in deciding whether to prosecute a case like this one. The IC's theory of prosecution—that respondent violated the Act even though he had no knowledge of the facts that brought his otherwise lawful contact within the statutory prohibition—would have been an unlikely one for the Department of Justice to pursue when it concededly (see Pet. 17) is contrary to the interpretation of the Act set forth in the Department's own regulations.

1. The IC invites review on the ground that "[t]he issue of ethics in government is an important one." Pet. 8. That may be true, but it hardly serves to distinguish this case from most other criminal cases. Bribery, counterfeiting, espionage, fraud, murder, obstruction of justice, racketeering, and most other matters addressed in Title 18 of the United States Code are also important subjects of federal regulation. But the general importance of the governmental interest served by a statute simply is not in itself a very significant indicator of the need for review by this Court. Rather, it is the importance of the particular legal issue presented that counts. The issue here has not surfaced in a single other case, is not likely to do so in the future (as the IC virtually concedes), and, as discussed below, poses little danger to the interests served by the underlying statute. In such circumstances, the need for review by this Court is nonexistent.[3]

2. The IC asserts that requiring the prosecutor to prove that a defendant had knowledge of his former

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[3] We are advised by the Department of Justice that there has never been another prosecution under Section 207(c). And prosecutions under other parts of Section 207 are also exceedingly rare. Between adoption of the current version of the Ethics in Government Act in 1978 and 1987, when data was compiled for submission to the district court in this case, there had been but four indictments under Section 207. See *Appropriations for the Admin. Conference of the United States: Hearing on H.R. 2153 Before the Subcomm. on Admin. Law and Govt'l Relations of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 65-74 (1986) (letter submitted by John C. Keeney, Deputy Assistant Attorney General, Criminal Division, Department of Justice). And this case is the only appellate decision interpreting any part of Section 207.

agency's direct and substantial interest in the subject of his communication "will seriously impede prosecutions under the Act." Pet. 7. Nothing could be farther from the truth. It is commonplace in the criminal law that the prosecution is obliged to prove a defendant's knowledge of the facts that render his conduct unlawful—something that can ordinarily be done without great difficulty by means of documents, admissions of the defendant, or inferences drawn from the surrounding circumstances.

That is especially true in proving a defendant's knowledge of his former agency's direct and substantial interest in a matter in a Section 207(c) prosecution. In the vast majority of cases in which a covered individual lobbies his former agency—for example, a former Justice Department official seeking to forestall indictment of a client or a former Defense Department official pressing for award of a procurement contract to a client—the subject matter of the lobbying will plainly and demonstrably be one of direct and substantial interest to the agency. Because the defendant's knowledge ordinarily is easily proven, the prosecution's task would not be materially affected by the holding that such proof is required. That the instant case involves the Executive Office of the President, one of the few agencies that may become interested in matters not obviously pending before it, simply makes the need for proof of knowledge in such rare cases all the more compelling.

3. The decision below will not significantly curtail prosecutorial discretion under the Ethics in Government Act. As the IC concedes (Pet. 17), the court of appeals' construction of the statute accords with the interpretation contained in Department of Jus-

tice regulations. See 28 C.F.R. § 45.735-7(d); see also Pet. App. 21a. The Department is the agency ordinarily responsible for enforcement of the criminal sanctions of the Act. This consistency between executive and judicial interpretations is further proof, if any were needed, that the IC's expressed fear of "serious" adverse practical consequences is nothing more than empty rhetoric.

4. Moreover, the ruling of the court of appeals is unlikely to have enduring practical significance for the additional reason that the provision of the Ethics in Government Act that it interpreted is on the verge of being replaced. On November 17, 1989, Congress passed and sent to the President the Ethics Reform Act of 1989, which repeals Section 207(c) and contains an entirely new version of post-employment lobbying restrictions. H.R. 3660, 101st Cong., 1st Sess. (1989). Under the new statutory language, "knowingly" and "with intent to influence" each unambiguously applies to both appearances before and communications with the former agency, but the requirement of a "direct and substantial" agency interest is eliminated. See 135 Cong. Rec. S16060, H8991 (daily ed. Nov. 17, 1989).[4] If the President signs this bill into law, as he has indicated he will do (see *Washington Post*, Nov. 18, 1989, at 1, col. 1), the correctness of the court of appeals' interpretation of the language in the repealed statute will plainly be of no continuing importance.

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[4] Needless to say, if a clear lobbying ban covering any attempts to influence the former agency had been in effect at the time of respondent's communications in 1982, there is no reason to suppose that respondent would have undertaken his efforts to generate White House interest in his clients' projects.

5. The IC's suggestion (*e.g.*, Pet. 8) that the decision below works some significant change in the general fabric of the criminal law by distorting the rule of lenity and the presumption in favor of *mens rea*, and that the ruling could therefore have an adverse impact on the enforcement of other criminal or regulatory statutes, is entirely unfounded. The disagreement between the majority and the dissent below centered on the question whether, in view of its particular language, punctuation, and legislative history, Section 207(c) is ambiguous. The resolution of that question has no importance to the construction of any other statute. Moreover, the application of the presumption of *mens rea* and the rule of lenity to the determination that Section 207(c) is ambiguous constituted an entirely unsurprising and uncontroversial invocation of accepted legal principles that requires no further review.

6. A related contention advanced by the IC (Pet. 8-9) is that the ruling below undermines the purported duty under the Ethics in Government Act "to make inquiry" and obtain "clearance" before engaging in contacts even if those contacts appear to the former employee to be lawful. In fact, neither Section 207(c) nor its implementing regulations set forth any such obligation.[5] In any event, this argument does not show that the case has far-reaching importance, but is merely an argument (the soundness of which we do not concede) why the ambiguity in this particular statute should be resolved in the IC's favor.

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[5] It would seem wholly inconsistent to suggest that there is a duty of inquiry but then to obtain exclusion at trial of evidence of respondent's efforts, through his lawyers, to determine whether he was acting in conformity with the requirements of the statute. See 2/5/88 Tr. 3549-50, 3578-79.

In sum, the petition assigns a wholly unrealistic significance to this case. Far from being "seminal" (Pet. 7), this case is a legal and practical dead end that would not warrant review even if incorrectly decided.[6] And as we now show, the IC's claims of error in the decision below are wholly unfounded.

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT

Not only is the legal issue presented by the petition of little consequence either to the administration of the Ethics in Government Act or more generally to the administration of federal criminal law, but the IC's grounds for challenging the correctness of the decision of the court of appeals are insubstantial.

1. *The nature of the Section 207(c) prohibition.* Section 207(c) prohibits certain government officers and employees from:

> knowingly act[ing] as agent or attorney for, or otherwise represent[ing], anyone other than the United States in any formal or informal appearance before, or, with intent to influence, mak-

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[6] The IC reads too much (Pet. 10) into Judge Edwards' statement in connection with the denial of rehearing (Pet. App. 109a). That statement is not an expression of belief that the case warrants review by this Court, but merely a recognition of the fact that, rehearing having been denied, review by this Court represented the last available procedural option. Since the four judges who joined in the statement did not believe that the perceived error in the panel's decision was important enough to require the attention of the full court of appeals, it would seem to follow *a fortiori* that the decision, even if it were erroneous, would not warrant review by this Court.

> [ing] any oral or written communication on behalf of anyone other than the United States to—
>
> (1) the department or agency in which he served * * *, and
>
> (2) in connection with any * * * proceeding, application, [etc.] * * * or other particular matter, and
>
> (3) which is pending before such department or agency or in which such department or agency has a direct and substantial interest * * *.

It is undisputed that Section 207(c) prohibits lobbying only with respect to particular matters that are either pending before the covered person's former agency or of direct and substantial interest to it. Accordingly, as the court of appeals correctly observed, an individual "may lawfully lobby his former agency the day after he has left it with the purpose of *stimulating* its interest in a matter of importance to a private client *so long as* that matter is not already before the agency and the agency does not already have a direct and substantial interest in it." Pet. App. 8a (emphasis in original).

This point, which the IC does not contradict, is critical to understanding the legal framework of the case. If the requirement of knowledge were not construed to apply to the facts that determine whether a communication is permitted or proscribed, a significant element of strict liability would be introduced into this felony statute. Because strict liability is disfavored in our criminal law (see *Liparota* v. *United States*, 471 U.S. 419, 426 (1985)), the IC was

rightly required to shoulder the burden of showing that his interpretation carried out the unmistakable intent of Congress—a burden he has wholly failed to satisfy.

2. *Plain meaning of the statute.* Section 207(c) defines an offense that may be committed by a former government officer in either of two ways: by appearing before his former agency on behalf of another on a matter pending before the agency or of direct and substantial interest to it; or by communicating with his former agency with the intent to influence it in connection with such a matter. The delineation of these two forms of prohibited conduct is preceded by the word "knowingly," and the issue is whether that word (a) applies to communications as well as to appearances, and (b) travels to the end of the statute, requiring knowledge of the matters specified in subparagraphs (1)-(3).

a. The IC takes the position (Pet. 10) that the statute "naturally breaks into two offenses, each with its own state-of-mind requirement." According to the IC's interpretation, " 'knowingly' is the mental element for the appearance offense and 'with the intent to influence' is the mental element for the communication offense." Pet. 11. This argument, depends, however, on a subtle rewriting of the statute. The "break" on which the IC depends to limit the reach of "knowingly" would not appear so "natural" if the IC had not inserted Roman numerals in the language of the statute at locations of its choice. See Pet. 10. The ambiguity of the language could as easily be cleared up—but in *respondent's* favor—simply by moving the Roman numeral "I" from just before "knowingly" to just after it.

b. The IC's interpretation of Section 207(c) depends, in large part, on two invalid premises. The first is that because the communication clause contains a specific intent requirement ("intent to influence"), it cannot also be subject to another mental element ("knowingly"). But as the court of appeals explained (Pet. App. 17a-18a), "[t]here is nothing in law or logic * * * to suggest that a specific *mens rea* cannot coexist with one of more general application." The Model Penal Code "provides several analogies that would support the applicability of both *mens rea* requirements to the communications offense." *Id.* at 18a. And the comments to the Model Penal Code make clear that "notwithstanding the requirement of a specific purpose, the culpability required as to other elements of the crime is satisfied if the person acted 'purposefully, knowingly or recklessly.'" *Ibid.*, quoting Model Penal Code § 2.02(3). The IC offers no response to these points.

Second, the IC mistakenly believes (see Pet. 17, 19, 23, 24) that, simply because it is a "mental" element, the presence of an "intent to influence" requirement fulfills the purpose for requiring proof of *mens rea* or a guilty mind, *i.e.*, to assure that appropriate culpability exists to justify a felony conviction. This view exalts form over function, for in this statute the specific "intent to influence" requirement fails to perform the function of distinguishing between lawful and unlawful conduct. While the existence of an "intent to influence" makes a communication a contact that is *potentially* covered by the statute (*i.e.*, not a social contact, a request for information, or a routine status inquiry), it does not, as noted previously, make the contact illegal.

It is therefore necessary, in order to distinguish between prohibited and permitted communications

made with the intent to influence, that the former employee know that the matter is pending before his former agency or that it is one in which his former agency has a direct and substantial interest. If he is without such knowledge, he lacks the guilty mind that is ordinarily a prerequisite to conviction under our system of criminal justice. See *Morissette* v. *United States*, 342 U.S. 246, 250 (1952) (The requirement of guilty knowledge "is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

c. The IC's reading of the statutory language, even if syntactically tenable, produces an absurd meaning. Significantly, the petition never explains what role "knowingly" performs under the IC's interpretation. There are only two possibilities. The first is that "knowingly" modifies only the phrase that is immediately adjacent. Under that view, the prosecution would need to show merely that the former official knew that he was making an appearance on behalf of another. But that construction gives an utterly trivial role to the knowledge requirement. As the court of appeals observed (Pet. App. 19a), " 'it hardly seems likely that th[e] improbable scenario' " that "a former official might be found to have made an appearance as the implied, or unwitting, agent for someone else" is " 'what Congress had in mind when it added 'knowingly' to the statute.' "

The alternative interpretation is that knowledge of the agency interest must be proven when the defendant is charged with an unlawful appearance, but not when the charge involves a communication. This would be utterly irrational. Indeed, every reason the IC gives in claiming that it is "implausible" that

Congress intended to require proof of a defendant's knowledge about his former agency's current interests (see Pet. 17-18) would apply as much to appearances as to communications.

In short, the IC can offer no plausible explanation for the function of the knowledge requirement under his construction of Section 207(c). This wholly defeats his claim that the language and structure of the statute unambiguously support his position.

3. *Legislative history of the statute.* The IC proclaims (Pet. 12) that the legislative history of Section 207(c) "is as clear and authoritative as legislative history ever gets" and that it "makes unmistakably clear that Congress intended that each of the two offenses defined by § 207(c) have its own state-of-mind requirement." In fact, however, the court of appeals correctly determined that the history is inconclusive as to the issue presented here (see Pet. App. 12a-17a).[7]

It is undisputed that the administration's proposal and the Senate version would unambiguously have adopted the court of appeals' reading of the statute. The House version, on the other hand, was quite unclear. See Pet. App. 15a.[8] The Conference Re-

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[7] While this is not the place to undertake a detailed discussion of this rather intricate matter, the Court will find a thorough canvassing of the legislative history of Section 207 in respondent's brief in the court of appeals (at 21-24) and in the brief submitted by the ACLU as *amicus curiae* supporting respondent (at 11-17).

[8] In his dissent, Judge Edwards twice (Pet. App. 29a, 37a) makes the critical mistake of confusing the wholly ambiguous House version with the paraphrase in the Conference Report. That paraphrase is in fact the *sole* basis for suggesting that the legislative history supports the IC's version.

port's *paraphrase* of the House version separated the appearance clause and the communication clause with a "(1)" and "(2)" that, as the court of appeals noted (Pet. App. 14a), do not appear in the provision as enacted. After a careful reading of the Conference Report, the court of appeals determined that the Report "fails to record" that the conferees "decided to adopt the House format with the conscious purpose of restricting the application of the adverb 'knowingly' to the appearance clause." Pet. App. 16a. The correctness of this view is unmistakable, and it wholly precludes the Conference Report from carrying the great weight petitioner would place upon it.

4. *Department of Justice and Office of Government Ethics Regulations.* What is most striking about the IC's argument on the regulations is his inability to point to a single one that actually interprets the statute in accordance with what he claims is its unambiguous meaning.[9] And although the IC proffers reasons why the regulations tending to support the court of appeals' reading should be given little weight, the fact is that every regulation that bears on the issue tallies in the court's favor.

The IC concedes (Pet. 17) that the Department of Justice regulation on Section 207(c), 28 C.F.R.

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[9] In an attempt to manufacture support for his position where none exists, the IC argues (Pet. 16) that because certain regulations refer to procedures for making inquiries, that means that "the OGE thinks that former employees have a duty to inquire" and therefore that the prosecution "need not prove that a former official knew the extent of the agency's interest." Even if there were such a duty under Section 207(c), which we dispute, it hardly follows that knowledge need not be proven for a criminal conviction.

§ 45.735-7(d), actually adopts the same interpretation as that reached by the court of appeals. The IC attempts to discount this regulation on the ground that it "is not entitled to the deference due an agency charged with administering a statute." Pet. 17. But even if the Justice Department is not the "administering" agency, it certainly is the "enforcing" agency, responsible for deciding whether criminal prosecution will lie for an alleged violation. As such, its interpretation is entitled to substantial weight in a criminal prosecution under the statute. At the very least, the Department's interpretation is strong evidence that the statute cannot be "unambiguously" to the contrary, as the IC asserts.

With respect to the OGE regulations, the IC is simply wrong in arguing (Pet. 16) that the regulation on Section 207(b)(i), 5 C.F.R. § 737.7(b)(4), expresses no view as to what "knowingly" modifies. In fact, as the court of appeals found (Pet. App. 20a), that regulation demonstrates OGE's view that "knowingly" applies not only to the phrase " 'acts as agent, or attorney for, or otherwise represents,' " but also to "the circumstances that make the representation unlawful." And the IC's contention (Pet. 16) that the regulation "addresses only the appearance offense" and "not the communication offense" is contradicted by other OGE regulations, which indicate that the operative word "representation" in the Section 207(b)(i) regulation refers to *both* "acting as agent or attorney, or other representative in an appearance, or communicating with intent to influence" (see 5 C.F.R. § 737.5(b); see also 5 C.F.R. §§ 737.3(b)(1) and (3)). If nothing else, the OGE

regulation is additional evidence that the statute can be read in more than one way.[10]

5. *Application of the rule of lenity and the presumption of mens rea.* The IC's arguments (Pet. 19-25) that the rule of lenity and the presumption of *mens rea* were "misapplied" by the court of appeals founder for several reasons, the most basic of which we address below.

a. The IC insists that "[l]imiting the word 'knowingly' to the appearance offense does *not* 'impose strict liability for the communication offense'" (Pet. 19; emphasis in original). The IC is seriously mistaken on this point, as we have shown (see pages 15-16, *supra.*). We cannot help but think that his reasoning may be clouded by his personal view (Pet. 22; emphasis supplied) that a former official who lobbies his former agency, "even if it concerns matters thought not to be of direct and substantial interest to the agency, *is not* * * * *'apparently innocent' at all.*"

b. The IC also misapprehends why the rule of lenity is applicable here. As the court of appeals observed (Pet. App. 22a), *two* policies underlie the rule that ambiguity in criminal statutes should be resolved in favor of the defendant. One has to do with fair warning by clear notice in the language

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[10] The IC's reliance (Pet. 16-17) on OGE regulations relating to Section 207(a) is wholly misplaced. Contrary to his assertion, that provision does not have the same structure as Section 207(c). Subsection (a) focuses on the former official's personal connection to the matter; it does not require that any particular agency have a direct or substantial interest therein, and it therefore creates no comparable question of the employee's knowledge.

of the statute about what conduct is prohibited, and the other relates to the principle that legislatures define what is criminal, not the courts. See *ibid.*, citing *United States* v. *Bass*, 404 U.S. 336, 348 (1971). It is the latter policy that is at work here, not the former.

Respondent does not claim to have lacked notice of what Section 207(c) forbids or to have been " 'surprised by a novel or unexpected interpretation of the law' " (Pet. 20). The problem here is respondent's lack of knowledge of the *facts* that determined the legality of his conduct. Thus, the IC's argument (*ibid.*) that "concern[s] about 'fair warning' " are satisfied because respondent is likely to have read the statute, or had his lawyer read it, and had access to advice on permissible lobbying activities completely misses the point. The court of appeals invoked the rule of lenity not because Section 207(c) is unclear as to what is prohibited, but because the statute does not clearly evidence any intent on the part of Congress to impose strict criminal liability for violations of the Act.

c. Nor do we believe that "access" by former officials to "rulings on the legality of their proposed conduct" (Pet. 22) makes any difference here. The IC's argument would essentially force covered individuals to seek preclearance of *every* proposed lobbying contact with their former agencies, even where, as here, there was no indication of the existence of an agency interest that might bring the statutory prohibition into play. Not only does this have the unpleasant odor of prior restraint, but it is utterly impractical. Lobbying contacts are usually highly time-sensitive, and one could hardly be as-

sured of an immediate response to an inquiry of this sort—especially where the "direct and substantial" agency interest can extend to the kind of tenuous and hidden connections relied on by the IC in this prosecution.

d. Finally, the IC notes (Pet. 24) that lobbying, though it is constitutionally protected, is properly subject to regulation by Congress. But while the First Amendment gives Congress room to regulate, the restrictions must be of the clearest sort. See *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967) ("[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity"). And to the extent Congress has not prohibited lobbying activity, that activity retains First Amendment protections. Here, the regulation that Congress deemed appropriate allows a former official to lobby his former agency on matters that are not of direct and substantial interest to the agency. Congress has not determined that a former official must " 'stay away,' " as the IC would advise (Pet. App. 26a), and First Amendment interests caution against cavalier adoption of that approach as a basis for giving a broad interpretation to the statutory prohibition that Congress did adopt.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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